

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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PANELIZED STRUCTURES, INC.,

Plaintiff,

v.

LIBERTY MUTUAL INSURANCE GROUP,  
LM INSURANCE CORPORATION,  
LIBERTY MUTUAL INSURANCE  
COMPANY and ARIZONA LABOR  
FORCE, INC., an Arizona corporation, dba  
ALLIED FORCES TEMPORARY  
SERVICES, et al.,

Defendant.

Case No. 2:12-cv-00264-MMD-GWF

ORDER

(Def.'s Motion to Dismiss – dkt. no. 24)

CONSOLIDATED WITH LEAD CASE NO.  
2:10-cv-01951-MMD-PAL

Before the Court is Defendants Liberty Mutual Insurance Group, LM Insurance Corporation and Liberty Mutual Insurance Company's Motion to Dismiss. (Dkt. no. 24.) For the reasons discussed below, the Motion is granted.

This case is ancillary to, and arises from, the now consolidated action in Case No. 2:10-cv-01951-MMD-PAL. The underlying facts are set out in the Court's Orders in the consolidated case. Pertinent to this Motion is that Liberty Mutual Insurance Group ("Liberty Mutual") originally brought suit against Panelized Structures, Inc. ("PSI") as part of a workers' compensation insurance dispute. PSI also brought a counterclaim against Liberty Mutual and related parties alleging that the lawsuit violated the terms of a workers' compensation insurance contract between Liberty Mutual and Arizona Labor Force, Inc.'s ("ALFI"), to which PSI argued it was an intended third party beneficiary.

1 The Court dismissed the counterclaim on the grounds that PSI's claim was barred by the  
2 applicable statute of limitations. PSI then filed a motion for reconsideration, which the  
3 Court denied.

4 PSI subsequently filed this separate action alleging that Liberty Mutual's  
5 prosecution of the original lawsuit violated fiduciary duties and PSI's third party  
6 beneficiary contractual rights under ALFI's insurance policy. PSI also alleges that  
7 Liberty Mutual had a duty to defend PSI against suit from the injured worker. Liberty  
8 Mutual then brought this Motion to Dismiss, arguing that PSI's claims are barred by res  
9 judicata, compulsory counterclaims that must have been brought in the original suit, and  
10 still barred by the statute of limitations.

11 The Court agrees that the issues PSI raises in this case were resolved in the  
12 original lawsuit. First, the parties to the original counterclaim and to this suit are the  
13 same.<sup>1</sup> Second, the counterclaim was dismissed as barred by the statute of limitations,  
14 a decision on the merits. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).  
15 Third, although the original litigation has not concluded with a final judgment, the issues  
16 in the counterclaim were actually litigated and necessarily decided. Finally, the claims  
17 asserted here are essentially the same as the claims in the counterclaim. The additional  
18 claims that PSI adds are still based upon the argument that Liberty Mutual's prosecution  
19 violated PSI's rights arising out of ALFI's insurance contract. Thus, the re-litigation of  
20 the issues decided previously would be improper.

21 Additionally, to the extent that PSI raises any new issues in this suit, those issues  
22 would be compulsory counterclaims that must have been raised in the original lawsuit.  
23 Both PSI's counterclaim and this action arise from the same transaction or occurrence  
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25 <sup>1</sup>There is a slight difference between Liberty Mutual Insurance Group/Boston — a  
26 party in the original — and Liberty Mutual Insurance Company — a party here. However,  
27 PSI has not alleged anything specifically against these parties, or even claimed they are  
28 different entities. Further, facts in the original suit establish LM Insurance Corporation as  
the entity which issued the insurance policy, and thus, the only party against whom a  
claim may be asserted.

1 as the original action. As such, the claims are compulsory counterclaims to the original  
2 suit. Fed. R. Civ. P. 13(a). Compulsory counterclaims that are not raised in the original  
3 litigation cannot be brought in another separate lawsuit. *Hydronautics v. FilmTec Corp.*,  
4 70 F.3d 533, 536 (9th Cir. 1995). Thus, PSI's claims are barred.

5 In its opposition brief, PSI attempts to justify this separate action with the  
6 argument that Liberty Mutual was not the real party in interest in the original lawsuit and  
7 thus, Liberty Mutual lacked standing to prosecute the case. As a result, PSI further  
8 argues, the Court lacked jurisdiction over the original action and the Court's Order  
9 dismissing PSI's counterclaim is void.

10 Although, the Court determined that Liberty Mutual was not the real party in  
11 interest, the substitution of the actual real party in interest, LM Insurance Corporation,  
12 resolved the jurisdictional issue. In a substitution context, a court is not deprived of  
13 jurisdiction "even though the original plaintiff presumably had no standing," see *G.K. Las*  
14 *Vegas Ltd. P'ship v. Simon Prop. Group, Inc.*, No. CV-S-04-1199-DAE-RJJ, 2007 WL  
15 4380134 at \*3 (D. Nev. Dec. 11, 2007), because, upon substitution of the proper plaintiff,  
16 the "action proceeds as if it had been originally commenced by the real party in interest."  
17 Fed. R. Civ. P. 17(a)(3). LM Insurance Corporation is considered to have prosecuted  
18 the case from the beginning, thus satisfying the standing and jurisdictional  
19 requirements.<sup>2</sup>


20 In sum, the arguments PSI presents to justify this separate suit are no different  
21 than those made in PSI's motion to set aside the Court's Order dismissing PSI's  
22 counterclaim in Case No. 2:10-cv-01951-MMD-PAL. The Court rejected the same  
23 arguments in that case, and similarly rejects them here. As PSI's claims are barred, PSI  
24 has not stated a claim on which relief can be granted as required by Fed. R. Civ. P. 8(a).

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26 <sup>2</sup>Substitution, its propriety and effects on litigation are more thoroughly discussed  
27 in the Court's Order granting Liberty Mutual's Motion to Substitute LM Insurance  
28 Corporation as Plaintiff Real Party in Interest Pursuant to Rule 17(a). (*Liberty Mutual*  
*Insurance Group v. Panelized Structures, Inc. et al.*, No. 2:10-cv-01951-MMD-PAL, dkt.  
no. 185.)

1 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss is GRANTED.  
2 The Clerk of Court is instructed to close this case.

3 DATED THIS 15<sup>th</sup> day of March 2013.

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7 MIRANDA M. DU  
8 UNITED STATES DISTRICT JUDGE  
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